ANNUAL REPORT

for the year ending
December 31, 1998

Workers' Compensation Appeals Tribunal

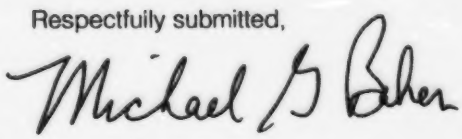
100-06871/

To Her Honour
The Honourable Myra A. Freeman
Lieutenant-Governor

May It Please Your Honour:

I have the honour to submit the Annual Report of the Workers' Compensation Appeals Tribunal for the year ending December 31, 1998.

Respectfully submitted,



Michael G. Baker, Q.C.
Minister of Justice

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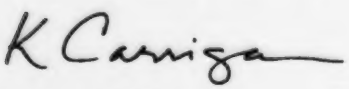
Dear Honourable Minister:

The Workers' Compensation Appeals Tribunal is pleased to present its Annual Report for the year ending December 31, 1998.

Respectfully submitted,



Katherine F. Carrigan
Chief Appeal Commissioner

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A time of review, a time of progress:

REPORT OF THE CHIEF APPEALS COMMISSIONER

This year was one of review and inspection, with the Auditor General's Report followed by that of the Select Committee. It was a year spent under the microscope for the compensation system in general, and the Tribunal was certainly no exception to that. At the same time, 1998 was a period of progress. I am pleased to report that our productivity as a Tribunal increased. We saw a growth in our decision-making volume, thus meeting our primary objective for the year.

The strides we were able to make in increasing our volume of decisions came about as a result of several initiatives. Primary among these was our Alternative Dispute Resolution project (ADR), which proved to be very successful during 1998 and assisted us in processing some of the backlog appeals. I want to stress that ADR is not only an efficient process, it is also a positive one. Even if a matter is not itself resolved, the worker has gained the opportunity to have his or her issues discussed. ADR is not for everyone, nor does it always lead to closure, but it always—at the very least—gives workers a chance to be heard.

We completed Phase I of the ADR project in 1998 and laid the groundwork for Phase II, where employers will have the option of participating in appeals. As part of our preparations, we invited an employer representative to sit on our ADR process committee. This adaptation of our committee structure is something new and innovative—something we are very pleased about at the Tribunal. We are certain that in 1999 the ADR project will go a long way in assisting us to reduce the backlog of appeals.

Unfortunately during 1998, appeals kept coming in at such a rate that the backlog did not decrease substantially. Its size remained relatively constant, at approximately 2,400 appeals. We anticipate that the steps we took this year will place us in a better position to address the backlog more effectively in future. In addition to proceeding with the ADR project, as mentioned above, we streamlined some of our internal processes. For example, we moved toward writing abbreviated leave-to-appeal decisions and shorter decisions whenever we could. We also saw an increase in our staff. We made solid progress with our publishing project, getting the WCAT web page up and running and the database complete. The latter enables Appeal Commissioners to do research more efficiently, freeing up valuable energy and time for the adjudication of appeals.

The compensation system, now in the final stages of its transition, relies on thoughtful and dedicated individuals to carry it along. Our Appeal Commissioners at the Tribunal have consistently worked to make the appeals process as effective as possible. During 1998, we increased our productivity and positioned ourselves for the future. In 1999, we expect to make major strides toward completing the backlog and look forward to achieving additional goals as well.

Judith Ferguson
Chief Appeals Commissioner
(August 1995–May 1999)

Who's New at WCAT

Jeannine Kurtz holds a bachelor's degree in geography from the University of British Columbia and received her LL.B. from Dalhousie Law School. As a research lawyer with her own business, she conducted legal research on a variety of topics including insurance and personal injury.

Alexander (Sandy) MacIntosh is an experienced trial lawyer whose background includes administrative, family, and criminal law, as well as civil litigation. He has also represented injured workers in their appeals to the WCB. Sandy is past president of the Kinsmen Club of Halifax.

Before joining the Tribunal, **Michael Hadskis** worked in the hearings department of the College of Nurses of Ontario, where he developed and implemented policies and procedures. He holds an LL.B from Dalhousie and an LL.M from Osgoode Hall, York University.

Allen Murray worked for Nova Scotia Legal Aid for four years, representing clients in the criminal, family, and administrative law fields in Antigonish, Guysborough, Inverness, and Richmond counties. His community involvement has included singing in church and university choirs and sitting on the Board of the Naomi Society for Victims of Family Violence.

"I'm enjoying the challenge of helping to eliminate the backlog of appeals cases in a timely manner, while at the same time maintaining fairness in the adjudication of individual cases."

-Sandy MacIntosh, Appeals Commissioner

Backlog Elimination Strategy

Along with two senior Appeal Commissioners, I presented an "Appeal Backlog Reduction Forecast and Plan," in effect, a backlog elimination strategy, to the Select Committee on Workers' Compensation, on August 21, 1998. The goal of the plan was to eliminate our appeal backlog by July 2000. As of July 31, 1998, the number of appeals in the backlog stood at 2,417.

Certain of our proposals were carried out in 1998, while others remain to be accomplished in 1999 and 2000. The backlog elimination strategy comprises the following:

- the appointment of approximately 10 additional full-time Appeal Commissioners (in November, four new Appeal Commissioners were appointed and began working with the Tribunal)

- the preparation of the newly appointed Appeal Commissioners to begin processing leave decisions by January 1, 1999 (the four new Appeal Commissioners were, in fact, trained and issuing leave decisions in the latter part of November)

- a legislative amendment or regulation providing for the ADR Process at WCAT in order to formalize and give specific statutory authority for the process (a regulation was passed in December)

- the introduction in January of an ADR process for non-transitional appeals (we held approximately 80 ADR sessions per month)

- a legislative amendment addressing the chronic pain issue, which allows for an abbreviated decision-making process with respect to these appeals

- the relative constancy of the law

- the dedication of Appeal Commissioners to a particular task—leave decisions, final decisions (further subdivided by issue), and ADR decisions—and a monthly target of decisions to process (this was begun, in its broad form, in 1998)

- monthly monitoring of the Tribunal's progress toward appeal resolution (this was begun in 1998)

Auditor General's Report

The Auditor General's Report served as a review of the three independent bodies that administer workers' compensation in this province: the Workers' Compensation Board (WCB), the Workers' Advisers Program (WAP), and the Tribunal. The report, tabled in November 1998, was critical of some aspects of the appeals process, but found that other aspects were working quite well.

The Auditor General noted that the process was not moving as quickly as it should be, as was evidenced by the backlog of appeals in the system. The report stated that a concerted effort must be made to clear up the backlog, but did not provide any specific suggestions as to how this should occur. WCAT's backlog elimination strategy, which we had submitted to the Auditor General, did not come under criticism in the report, nor was an alternative strategy proposed. It was stated, however, that our plan should be further elaborated and its financial implications examined in greater detail.

"The Tribunal certainly appreciates that people are concerned about the backlog, and we appreciate the government's response to this and to other issues in the compensation system—the request of an Auditor General's Report and the establishment of a Select Committee. We don't see these processes as negative."

-Judith Ferguson, Chief Appeals Commissioner

The report also indicated that WCAT should formalize its performance measures and consider a review of its management information systems (MIS), and that our communications with injured workers should be clearer and more concise. Notably, we had already been working in these areas. We have recently completed major revisions to our statistical database, for example, and have issued two pamphlets which will help, we believe, in alleviating any confusion concerning the appeal process.

In the absence of an alternative backlog elimination strategy, the Tribunal will continue with the strategy we have developed. We will endeavour to incorporate the majority of the Auditor General's recommendations into our practices and goals.

Select Committee Report

The Select Committee, which was struck by the government of Nova Scotia in June, was made up of members from each political party, as well as employer, legal, medical, and injured-worker representatives. Its mandate was to hold public hearings across the province and, informed by the outcome of these hearings, to make recommendations regarding workers' compensation law and the Auditor General's report.

The Select Committee invited the Tribunal to make a presentation prior to the beginning of the public-hearing process. Its main concern regarding the appeals system was the backlog. We provided the Select Committee with our backlog elimination strategy, which sets a target completion date of July 2000. This strategy rests upon certain assumptions, notably that revised legislation will provide us with the appropriate clarity and certainty to process the chronic pain appeals, that our staff will be further increased, and that the ADR project will continue.

The Select Committee's report, filed in November, included recommendations for the Tribunal. Among them: that the leave-to-appeal step be eliminated from the Tribunal's process; that the backlog be completed within one year; and that a standard time limit be imposed on the processing of each appeal.

The Tribunal is in full agreement with the intent of the report. However, we have concerns about the feasibility of some of its recommendations and have expressed these concerns and tried to provide alternatives. In particular, the Tribunal does not believe it possible to complete the backlog in a one-year period without compromising the quality of decisions made.

There are two components to completing a backlog. One is that you want to do it quickly, but the other is that you still want to provide a certain quality of justice to the injured worker. Both of these issues are important and must be considered each step of the way."

- Judith Ferguson, Chief Appeals Commissioner

The Tribunal also had the opportunity to express these concerns to the Law Amendments Committee in January 1999. Hopefully, these will be taken into account as part of the final process during which Bill 90—the ultimate outcome of the Select Committee's deliberations—is formalized and becomes law.

At the close of our fiscal year, the Tribunal looks forward to the clarity which will be provided when the Workers' Compensation Act is amended through the provisions of Bill 90—hopefully during 1999. We will attempt to meet whatever legislative requirements are put forward at that time.

ADR: Moving Ahead

In 1998, we completed Phase I of the Alternative Dispute Resolution project (ADR) and laid the groundwork for Phase II. The ADR project is a WCAT initiative, undertaken in partnership with the WCB and the Workers' Advisers Program (WAP). A voluntary process for appellants, it began on a pilot basis in 1997 to provide a non-adversarial setting in which they could attempt to resolve a dispute with the WCB.

During Phase I, the appellant, accompanied by a Workers' Adviser or other legal counsel, met with a WCB representative and a WCAT Appeal Commissioner, who facilitated the session. Phase II, set to begin in early 1999, introduces a fifth participant: The employer will have the option of getting involved. This becomes possible because the scope of participation will no longer be restricted to appeals which had originally come under the jurisdiction of the former, Workers' Compensation Appeal Board. Employers are not entitled to participate in appeals within that group.

During Phase I, the ADR process was available to transitional appellants only—those whose appeals had been part of the former Appeal Board's caseload. The ADR process for this appeal population was completed on August 31. From January through August, 497 transitional ADR sessions were held across the province and 311 of the appellants were able to settle their appeals. This represents a 62.6 per cent settlement rate. One hundred and fifty appeals (30.2 per cent) were not settled through the ADR process, either because of the complexity of the case or because the worker did not find the WCB's offer acceptable. Finally, 36 sessions (7.5 per cent) were cancelled or withdrawn.

The ADR process committee—made up of representatives from the Tribunal, the WCB, and WAP—continued to guide and monitor ADR, and created an information pamphlet during the summer of 1998. The committee also responded to complaints workers raised about the process and made every attempt to see that complaints were addressed. Overall, workers expressed satisfaction with ADR. Those whose sessions did not result in settlement went back to their place on the waiting list for a traditional hearing. In many cases, they reported being pleased with the ADR process and with the chance it afforded them to have their stories heard.

In spring, the process committee began preparations to launch Phase II. During this phase, ADR will be available to appellants whose injuries occurred at any time prior to February 1, 1996 and whose appeals were filed after June 1, 1995.

In preparation for employer participation, nine employer information sessions were held across the province from August 31 to September 4. All of Nova Scotia's 16,000 assessed employers were invited to attend, and the sessions were also open to major interest groups. To reflect the significant upcoming expansion of the ADR process, the committee has expanded to include an employer representative.

ADR began on a trial basis, and has proven highly valuable in reducing the waiting time for many injured workers. On December 18 of this year, it obtained formalized authority. The Workers' Compensation Appeals Tribunal Alternative Dispute Resolution Regulations were approved by the Lieutenant Governor, thus ensuring the continuation of ADR.

Revisiting the Doward Decision

On April 2 of this year, the Tribunal issued its second "Doward decision" (98-109-TAD). The previous April, the Nova Scotia Court of Appeal had upheld Lorraine Doward's appeal of our original Doward decision (96-010D), and the matter was remitted back to us to re-adjudicate in light of the Court's findings.

A panel of three WCAT Appeal Commissioners heard further evidence and argument, including testimony from the appellant, during a five-day hearing in November 1997. On April 2, their decision was rendered and released. In summary, the findings were as follows:

- chronic pain and chronic pain syndrome can be caused, in part, by a work-related accident
- chronic pain and chronic pain syndrome can become a permanent medical impairment within the meaning of the former legislation
- chronic pain and chronic pain syndrome are multi-causal conditions and a work-related accident may be one of the causes
- chronic pain and chronic pain syndrome can affect a person's ability to earn an income.

Accordingly, when a worker's chronic pain or chronic pain syndrome is caused by a job-related accident, and when it becomes a permanent medical impairment and reduces the worker's income-earning ability, it is compensable under section 9(2) of the former Workers' Compensation Act of Nova Scotia for those claimants whose injuries occurred during the "window period" from March 23, 1990 to February 1, 1996.

The Tribunal found that the appellant was suffering from chronic pain syndrome which had developed after a workplace accident and which had become a permanent medical impairment. However, the evidence did not support a conclusion that her subsequent wage-loss was a result of this impairment. We determined that she might instead be eligible for compensation under section 45(2) of the former Act, which addresses work-related permanent medical impairments which do not result in wage-loss. Therefore, we referred the appellant back to the WCB for reconsideration.

Immediately upon rendering this decision, the Tribunal extended Invitations for Submission to all legal counsel with clients who suffered chronic pain and whose injuries occurred during the window period. Decision 98-109-TAD did not, however, have the expected degree of impact for this appeal population. In July, a hold was placed on all chronic pain appeals pending the outcome of the Select Committee hearings and deliberations.

Decisions from the Court of Appeal

The Nova Scotia Court of Appeal (on appeal from WCAT decisions), issued several important decisions in 1998, interpreting the "Transitional" provisions of the Workers' Compensation Act. These sections of the Act deal with injuries occurring prior to the coming into force of the new Act, on February 1, 1996. The decisions—Lowe, Muise, and Richard—have had a significant impact on the Tribunal.

In *Lowe* v. *Workers' Compensation Board (N.S.)* (1998), 166 N.S.R. (2d) 321 (CA), the Court interpreted sections 226 and 227 of the Act. These provisions deal with workers injured prior to March 23, 1990, who, as of the date the new Act came into force, received, are receiving, or are entitled to receive compensation for permanent partial or total disability as a result of their injury.

The Court accepted the argument put forward by the WCB that the legislature intended to authorize the application of permanent impairment ratings for these appellants. It found that sections 226 and 227 effectively replace, for persons injured prior to March 23, 1990, a previous decision of the Court in *Hayden*. (*Hayden* had interpreted the former Workers' Compensation Act as requiring pure wage loss awards for workers with permanent injuries.)

In *Workers' Compensation Board (N.S.)* v. *Muise* (May 12, 1998), the Court considered section 229 of the Transitional provisions. This provision deals with workers injured prior to February 1, 1996, who, as of the date the new Act came into force, are receiving or are entitled to receive compensation for temporary total or partial disability as a result of their injury. The Court held that s. 229 is directed to the recalculation of compensation under the new Act, where benefits had previously been awarded under the former Act. Where benefits are awarded in the first instance, the new Act also applies. The Court went further and addressed the Transitional provisions, as a whole, stating that, "the current Act, save where a contrary intention appears (as in s. 228), is intended to apply to parties who had suffered injuries prior to its enactment."

The final decision of particular note is *Workers' Compensation Board (NS)* v. *Richard* (August 11, 1998). In *Richard*, the Court concluded that the Doward decision does not preclude the application of WCB policies made under the current Act to s.228 cases. Such policies must not, however, be interpreted or applied so as to take away rights that workers would have had under s. 228. This

means that WCB policies regarding permanent benefits should be applied as long as they do not interfere with the benefits available under the former Act for the same condition. The Court also stated that, for cases within its jurisdiction, the Tribunal has broad powers to review WCB decisions, including the power to exercise the discretion of a Hearing Officer to refer workers for vocational rehabilitation assistance. In doing so, the Tribunal is bound by applicable Board policies made under the current Act.

The Publishing Project

The publishing project continued to make great progress during 1998. Its major initiative—a database developed in partnership with the WCB's Internal Appeals Department—was completed and is now in operation.

A comprehensive thesaurus of compensation issues and conditions was finalized for the database in January, and Appeal Commissioners from WCAT and WCB Hearing Officers were trained in its use. The thesaurus is a resource they can consult when preparing headnotes (summarized versions) of their decisions.

The database as a whole is proving to be a valuable research tool for both organizations.

In addition to headnotes, it houses full-text copies of all Tribunal and Hearing Officer decisions and is indexed by subject heading, physical condition, and body part involved. The database is mounted on the department of Labour server and can be accessed by the general public through the department's library.

Also during 1998, WCAT's home page on the World Wide Web became operational. A prototype designed during 1997 was completed this year, and feedback from all Appeal Commissioners was solicited, received, and incorporated. The home page provides:

- the full text of our three brochures, "If You Wish to Appeal," "The Appeals Process," and "Alternative Dispute Resolution"
- contact information, including a list of Appeal Commissioners
- copies of Annual Reports filed to date
- downloadable copies of Appeal Forms A, B, and C
- links to relevant legislation
- link to *Report of the Nova Scotia Select Committee on the Workers' Compensation Act*, November 1998
- link to *Audit of the Nova Scotia Workers' Compensation System*, (Chapter 16), November 1998, Grant Thornton for Auditor General.

The home page is located at http://www.gov.ns.ca/labr/wcat/wcatmain.htm

To contact the Workers' Compensation Appeals Tribunal

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Halifax, N.S. B3J 2V9

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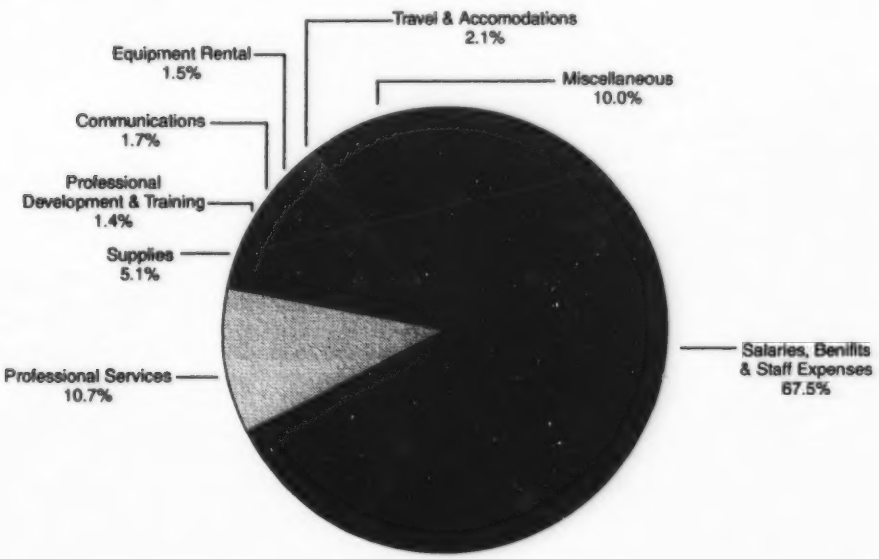
1998 Budget Expenditures to March 31, 1999

Salaries, Benefits & Staff Expenses	$750,218.00
Professional Services	119,193.00
Supplies	56,854.00
Professional Development & Training	15,216.00
Communications	18,677.00
Equipment Rental	16,579.00
Travel and Accomodations	23,581.00
Miscellaneous	111,321.00
Total	**$1,111,639.00**



Appeals Filed With WCAT
January 1, 1998 - December 31, 1998

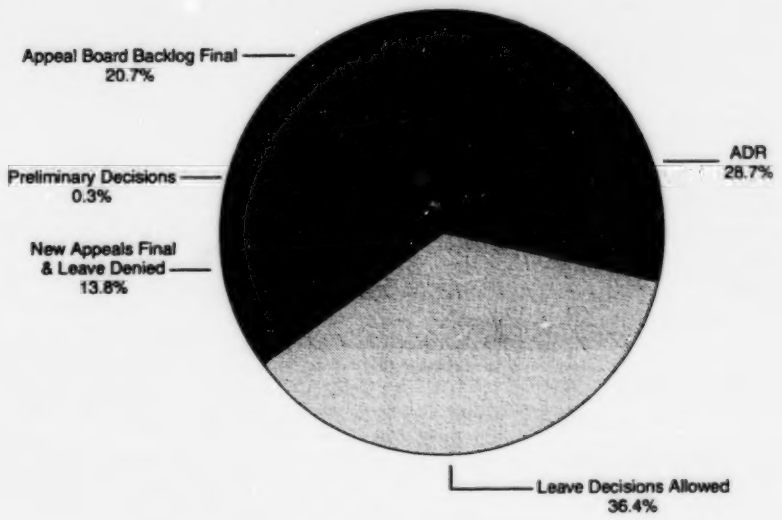
Month	Appeal Board Backlog Appeals	New Appeals	Total
January	2	51	53
February	3	33	36
March	1	48	49
April	0	44	44
May	0	62	62
June	0	45	45
July	0	54	54
August	0	57	57
September	0	61	61
October	0	47	47
November	0	45	45
December	0	46	46
Total	**6**	**593**	**599**

Decisions and Notices Rendered and Oral Hearings Held

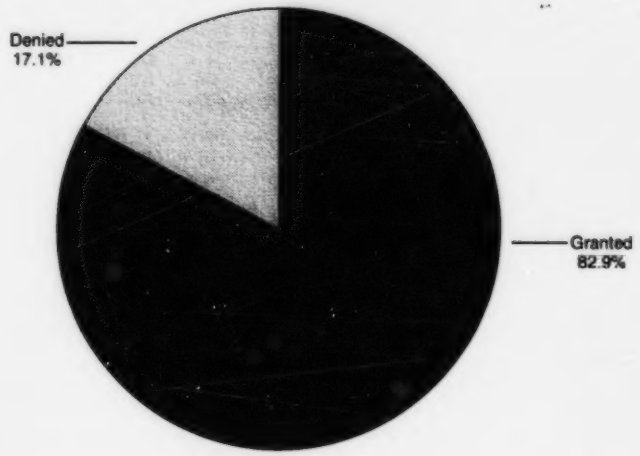
Hearings Held	60
Decisions Released	
Appeal Board Backlog	
Appeal Stream—Final Decisions	238
ADR	329
Preliminary	4
New Appeals	
Final Decisions	72
Leave Decisions	504
Granted	418
Denied	86
Appeal Board Backlog Notices of Leave	6

Decisions Rendered

All Appeal Types

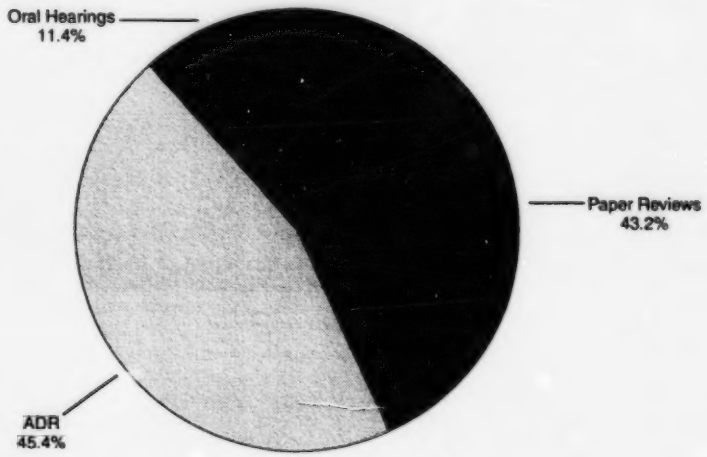


Outcome at Leave Stage



Leave Decisions

Final Decisions Rendered



Mode of Hearing